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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, DC 20536

[redacted]

File: SRC 02 025 53458 Office: TEXAS SERVICE CENTER Date: JAN 21 2004

ON RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a dentistry laboratory that seeks to continue to employ the beneficiary temporarily in the United States as its president for an additional period of two years. The director found that the petitioner had not established that the U.S. and foreign companies are still qualifying entities. The director also found that the petitioner had not established that the foreign affiliate or subsidiary was currently doing business. The director determined that the petitioner had not shown that the U.S. company had been doing business for the prior year. The director also determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity.

It is noted that the director also determined that the petitioner had not established that the beneficiary had been employed abroad in a primarily managerial or executive capacity. However, this is not an issue for an extension and should have been addressed in the original petition. This issue will not be discussed in this proceeding.

On appeal, the petitioner explains that during the last year, the parent company transferred $145,000 to cover expenses such as wages, business operations and growth and to provide capital to the subsidiary Kardolly International, Inc. The petitioner indicates that at a personal level, the beneficiary has invested $294,900 for housing, a laboratory, vehicles and equipment. The petitioner further explains that last year, Dr. Escobar participated in several activities to familiarize himself with the technology and techniques of American dental institutions and the manner in which operations are conducted. The petitioner states that Dr. Escobar started to work in a small laboratory opened by the petitioner which did not yield much profit, but nonetheless, gave him the opportunity to later purchase a larger laboratory in Boca Raton, Florida. The petitioner further states that at the present time it is organizing another clinic in West Palm Beach in which the petitioner will have a 60% ownership interest.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate

thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The petitioner is a corporation that originated in the State of Florida on August 8, 2000. The petitioner filed its petition on October 29, 2001. Since the petitioner had been doing business for more than one year at the time the visa petition was filed, it shall not be considered under the regulations covering the start-up of a new business.

The regulations at 8 C.F.R. § 214.2(l)(14)(ii) state that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
>
> (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
>
> (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
>
> (E) Evidence of the financial status of the United States operation.

The petitioner submits an additional copy of the beneficiary's resume for consideration.

The petition states that the Carlos E. Escobar Dental Clinic in Columbia owns 60% of the stock of the petitioning entity. The record contains no evidence to substantiate that assertion. Based on the record and the information provided on appeal, it is determined that the petitioner has not established that a qualifying relationship exists between it and the Carlos E. Escobar Dental Clinic, its claimed parent company abroad. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, the visa petition may not be approved for this reason.

The second issue in this proceeding is whether the petitioner and the foreign entity are doing business. The record shows that the foreign entity was doing business at the time of filing. The record also shows that the U.S. company had been doing business for the previous year prior to the date this visa petition was filed.

The next issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's job duties in the United States as follows:

- Preside over and represent the corporation
- Responsible for the financial management of the company
- Establish policies of (and) procedure(s)
- Marketing and promotion of the lab
- Control bank accounts
- Establish resource needs: human and physical
- Promote and participate in academic training courses

The petitioner considers that it works in two areas. The beneficiary is employed on a full-time basis making full or partial dentures of casts and acrylics. The second work area deals with castings and dental porcelain in which the firm uses the services of other specialized laboratories located in the State of Florida. This second area of work includes jobs such as frameworks for partial and full dentures, metal posts, crowns, conventional ceramics and pressed ceramics.

The Employer's Quarterly Federal Tax Returns provided for the record beginning June 30, 2001 and ending December 31, 2001 indicate that the beneficiary was the only employee receiving compensation from the corporation during that period. The petitioner's income statement for the eight month period ending August 31, 2001 shows that the petitioner achieved total sales of $15,049.74 and earned a gross profit of $13,655.23.

The record reveals that on January 15, 2002, the petitioner hired two part-time employees. The record also indicates that the petitioner is organizing another clinic in West Palm Beach in which the petitioner will have a 60% ownership interest. The hiring of two new part-time employees and the potential acquisition of another clinic in West Palm Beach does not enhance the beneficiary's eligibility for this classification. In this case, the petitioner must establish eligibility at the time of filing; See 8 C.F.R. § 103.2(b)(12); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record does not clearly show that the petitioner had any staff that would relieve the beneficiary from performing non-qualifying duties. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity.

Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). Consequently, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.